Petition

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NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD W. MAHER, COMMISSIONER OF INCOME MAINTENANCE, STATE OF CONNECTICUT,
Petitioner,

V.

RICHARD SCHWEIKER, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; BURNSIDE CONVALESCENT HOME, INC.; EAST HARTFORD CONVALESCENT HOME; SAINT MARY HOME, INC.; SOUTH WINDSOR CONVALESCENT HOME, INC.; SOUTHPORT MANOR CONVALESCENT CENTER, INC.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Edward W. Maher, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 30, 1981.

I. QUESTIONS PRESENTED

1. Whether the Superior Court of the State of Connecticut had subject matter jurisdiction over the claims made against the United States Secretary of Health and Human Services for declaratory relief regarding the conformity of a previously unconstrued State statute with Federal statutes and regulations?

2. Whether the United States District Court had subject matter jurisdiction over the claims against the Secretary upon removal of the case from State court?

II. PARTIES TO THE PROCEEDING

The following were named as parties to the proceeding in the Court of Appeals for the Second Circuit:

Burnside Convalescent Home, Inc.,
East Hartford Convalescent Home,
Saint Mary Home, Inc.,
South Windsor Convalescent Home, Inc.,
Southport Manor Convalescent Center, Inc.,
Patricia Harris, Secretary, United States
Department of Health and Human Services.*

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*Richard Schweiker's name has been substituted for that of Patricia Harris in the caption of this case pursuant to Rule 43(c) of the Federal Rules of Appellate Procedure and Rule 40.3 of the Rules of this Court.

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IV. OPINIONS BELOW

The opinion of the Court of Appeals has not been reported. A copy of the slip opinion appears in the Appendix hereto. A-1a. The opinion of the District Court for the District of Connecticut has not been reported. A copy of the slip opinion appears in the Appendix hereto. A-5a.

V. JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 30, 1981, and the petitioner was granted an extension of time to March 15, 1982 in which to file this petition. This petition is being filed within the required time as extended. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

VI. STATUTORY PROVISIONS

42 U.S.C. §1316(a)

(1) Whenever a State plan is submitted to the Secretary by a State for approval under subchapter I, VI, X, XIV, XVI, XIX or XX of this chapter, or part A of subchapter IV of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such subchapter. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(2) Any State dissatisfied with a determination of the Secretary under paragraph (1) with respect to any plan may, within 60 days after it has been notified of such determination, file a petition with the Secretary for reconsideration of the issue of whether such plan conforms to the requirements for approval under such subchapter. Within 30 days after receipt of such a petition, the Secretary shall notify the State of the time and place at which a hearing will be held for the purpose of reconsidering such issue. Such hearing shall be held not less than 20 days nor

more than 60 days after the date notice of such hearing is furnished to such State, unless the Secretary and such State agree in writing to holding the hearing at another time. The Secretary shall affirm, modify, or reverse his original determination within 60 days of the conclusion of the hearing.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary under section 304, 604, 804, 1204, 1354, 1384, 1396c, or 1397b of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determination as provided in section 2112 of Title 28.

42 U.S.C. §1396a. State plans for medical assistance — Contents

(a) A State plan for medical assistance must —

(5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan; or provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan, except that the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan approved under subchapter I or XVI of this chapter (insofar as it relates to the aged) if the State is eligible to participate in the State plan program established under subchapter XVI of this chapter, or by the agency or agencies administering the supplemental security income program established under subchapter XVI or the State plan approved under part A of subchapter IV of this chapter if the State is not eligible to participate in the State plan program established under subchapter XVI of this chapter;

42 U.S.C. § 1396c

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds

> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
>
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

17 C.G.S. §311

(b) Any institution or agency to which payments are to be made under sections 17-312 to 17-314, inclusive, which is aggrieved by any decision of said commissioner may, within ten days after written notice thereof from the commissioner, obtain, by written request to the commissioner, a rehearing on all items of aggrievement. Any such items not resolved at such rehearing to the satisfaction of such institution or agency and said commissioner shall be submitted to binding arbitration to an arbitration board consisting of one member appointed by the institution or agency, one member appointed by the commis-

sioner and one member appointed by the chief court administrator from among the retired judges of the superior court, which retired judge shall be compensated for his services on such board in the same manner as a state referee is compensated for his services under section 52-434.

52 C.G.S. §29

The superior court shall have power, in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. The judges of the superior court shall have power to make such orders and rules as they may deem necessary or advisable to carry into effect the provisions of this section.

52 C.G.S. §414

All the arbitrators shall meet and act together during the hearing, but, when met, a majority may determine any question. If any party fails to appear before the arbitrators or an umpire after reasonable notice, the arbitrators or umpire may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them. If a written agreement to arbitrate provides that two or more arbitrators therein designated or referred to may select or appoint a person or persons as an additional arbitrator or arbitrators or as an umpire, or if a person or persons are selected or appointed as a substitute arbitrator or arbitrators or umpire and any such selection or appointment is made after evidence has been taken in the arbitration, the matters shall be reheard, unless a rehearing is waived in the written agreement to arbitrate or by subsequent written consent of the parties. Before hearing any testimony or examining other evidence in the cause, the arbitrators and umpire shall be sworn to hear and examine the matter in controversy faithfully and fairly and to make a just award according to the best of their understanding, unless the oath is waived in writing by the parties to the arbitration agreement.

Any arbitrator or an umpire shall have power to administer oaths to witnesses.

VII. Statement

The petitioner, the Connecticut Commissioner of the Department of Income Maintenance (hereinafter the "Commissioner") is the head of the single State agency in Connecticut responsible for the administration of the Title XIX Program in Connecticut.[1] One of his duties is to establish annually a cost-related rate of payment for each participating long term care facility (hereinafter "nursing home") which provides services to eligible recipients under the Medicaid program.

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[1]Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, "Grants To States For Medical Assistance Programs" (hereinafter "Medicaid") is a joint Federal/State program for provision of medical services to the needy.

Pursuant to 42 U.S.C. §1396a(a)(5), there must be a single state agency to administer the Medicaid Program. The agency must submit a plan to the Secretary of the United States Department of Health and Human Services (hereinafter the "Secretary") which conforms to Federal requirements for State plans and specifies the terms of the State's furnishing, and paying for, medical services to needy individuals.

The Secretary then reviews the State Plan and, if it conforms to Federal law, approves it, thereby authorizing Federal financial participation in the cost of providing medical services. If the State Plan does not conform to Federal law, the Secretary must notify the State and the State may request a hearing and subsequently seek judicial review in the United States Courts of Appeals for the Circuit in which the State is located. 42 U.S.C. §1316(a).

If the Secretary finds that a previously approved State Plan is no longer in conformance with Federal law, the sanction process begins. After notice and hearing the Secretary, in his discretion, may withhold from the State payment of all or part of the millions of dollars of Federal funds. 42 U.S.C. §1396c. Upon completion of the sanction process, the State may appeal the final decision to the United States Court of Appeals. 42 U.S.C. §1316(a).

In calculating a participating nursing home's annual rate of reimbursement under the program, the Commissioner may take into account only the reasonable costs incurred by the nursing home for rendering services necessary for patient care pursuant to the State Plan which has been submitted to and approved by the Secretary.

Prior to the commencement of this action, the Connecticut legislature enacted a law, codified in 17 C.G.S. §311(b), which permits nursing homes, under certain circumstances, to submit to binding arbitration disputes over the rate calculation. Three people are appointed as arbitrators: one by the Commissioner, one by the nursing home, and a retired judge appointed by the State of Connecticut Chief Court Administrator. *The Secretary originally approved the regulations concerning binding arbitration as being in conformance with the federal requirements and approved them as part of the Connecticut State Plan.* After the Commissioner and several nursing homes began utilizing binding arbitration, it was found that they could not agree on the scope and nature of the binding arbitration. It became apparent that this provision of the state statute raised questions as to a potential conflict with the Federal requirements of a single state agency in charge of the Medicaid program, and the Federal requirement that payment only be made in accordance with the State Plan. The nursing homes were seeking to have the arbitration board substitute its judgment for that of the single state agency regarding allowable costs.

The Commissioner wrote to the Regional Office of the Secretary seeking guidance on this question. Contrary to the first determination by the Secretary that binding arbitration conformed to Federal law, the Secretary, through the Regional Medicaid Director, advised the Attorney General of the State of Connecticut by letter dated May 11, 1979 (A-6a) that the binding arbitration provision of the state statute violated Federal "Medicaid" statutes and regulations, *inter alia,* 42 U.S.C. §1396a(a)(5) and 42 C.F.R. §431.10 regarding the requirement that there be a single state agency with authority to administer the State Plan. If the Secretary is correct, the State Plan is not in

conformance with Federal law and the Commissioner will be denied Federal reimbursement once he engages in binding arbitration. The Commissioner brought a declaratory judgment action regarding the binding arbitration provision pursuant to 52 C.G.S. §29 in the Superior Court of the State of Connecticut naming several nursing homes and the Secretary as defendants. The purpose of the declaratory judgment action was to obtain a declaration of the legal rights and obligations of the parties.

The Secretary was made a party defendant to insure that any subsequent interpretation of pertinent Federal law would be binding upon the Secretary and to insure against a substantial risk of inconsistent obligations among the parties, i.e., one interpretation of Federal law involving the Commissioner and the nursing homes permitting binding arbitration and a second interpretation of Federal law involving the Commissioner and the Secretary prohibiting it.

The Secretary removed the action from State court to the United States District Court pursuant to 28 U.S.C. §§1441 and 1442 and moved to dismiss the action as to the Secretary on the ground that the Superior Court of the State of Connecticut did not have jurisdiction over the Secretary and hence the United States District Court did not have jurisdiction upon removal, and on the alternate ground that no claim had been stated against the Secretary. Thereafter, the plaintiff amended his Complaint, making more specific his claims against the Secretary for declaratory relief.

The District Court granted the Secretary's motion to dismiss on the ground that "...the complaint discloses no basis for the proposition that the state court had jurisdiction over the subject matter of the claims against her" and hence the District Court did not have jurisdiction over the claims against her upon removal. The District Court then remanded the claims between the Commissioner and the nursing homes to the Superior Court of the State of Connecticut.

The Commissioner appealed from the decision granting the dismissal of the Secretary from the action to the Court of Appeals for the Second Circuit. The Commissioner argued before the Court of Appeals that State and Federal courts have concurrent jurisdiction over matters arising under the laws of the United States unless the State courts have been prohibited from exercising such jurisdiction and that State courts have not been precluded from interpreting whether their State statutes conform to Federal Medicaid requirements.

The Commissioner further argued before the Court of Appeals that the Secretary was not immune from this suit. Judicial review of the Secretary's determination of conformity of the State Plan to Federal law has been permitted by statute, 42 U.S.C. §1316(a), and that statute does not require that the Commissioner place millions of dollars of Federal matching funds in jeopardy as a condition precedent to judicial review. The Commissioner also argued that the grant of jurisdiction to the Federal Court of Appeals did not automatically exclude the jurisdiction of the State courts.

The Court of Appeals apparently agreed that the State court had jurisdiction over the subject matter of whether the State statute conformed to the Federal statutes and regulations. However, the Court of Appeals affirmed the decision below, "...on the basis of the Secretary's sovereign immunity to suit in the absence of consent." The Court of Appeals construed the 42 U.S.C. §1316 waiver of sovereign immunity as limited to judicial review of final decisions of the Secretary with jurisdiction vested exclusively in Federal Courts of Appeals. The Court indicated that the determination of the Regional Director of the Medicaid Program in this case was not sufficiently "final" for purposes of 42 U.S.C. §1316.

Thus the question has become whether the Secretary's action was sufficiently "final" for purposes of 42 U.S.C. §1316, i.e., whether the State must wait for the conclusion of the sanction process before it may obtain judicial review of a determination that a previously approved provision of a State Plan does not

conform to Federal law, and whether Federal Courts of Appeals have exclusive jurisdiction over suits against the Secretary regarding a determination of conformity of a previously unconstrued State statute with Federal statutes and regulations.

VIII. Reasons For Granting The Writ

A. The Question of Finality Raises an Important Statutory Issue Which Has a Multi-Million Dollar Impact On The State of Connecticut and Has Implications For All States Participating in the Title XIX (Medicaid) Program.

The decision of the Second Circuit indicates that once the Secretary has approved a provision as conforming to Federal law, a subsequent reversal of that position by the Secretary will not be considered final, for purposes of judicial review, until the Secretary has completed the sanction process.

The question of whether the States must wait for the conclusion of the sanction process before they can obtain judicial review of a determination that a previously approved provision of a State plan does not conform to Federal law raises an important question of statutory construction which has implications for all the States participating in the programs to which 42 U.S.C. §1316 applies,[2] and millions of Federal dollars in each State.

Thus, in this case, the Secretary approved as part of the Connecticut State Plan the regulations implementing binding arbitration as conforming to the Federal requirements. Only after binding arbitration proceedings were commenced did the Secretary indicate that they violate Federal law.

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[2] 42 U.S.C. §1316(a)(1) and (a)(3) apply to numerous subchapters of the Social Security Act governing, *inter alia,* Grants To States For Old Age Assistance, Services to Aged, Blind or Disabled, Aid To The Blind, Aid To The Permanently And Totally Disabled and Aid To Families With Dependent Children.

Having approved the binding arbitration provisions as amendments to the State Plan, the Secretary precluded any possibility of judicial review prior to implementation. If the Secretary originally had determined that binding arbitration did not conform to Federal requirements and therefore disapproved the Plan, there is no question that the State, at that point, would have been entitled to judicial review prior to the accrual of potentially millions of dollars of damage.[3] It is therefore ludicrous to argue that the State would have been entitled to judicial review *before* millions of dollars of Federal reimbursement were placed in jeopardy but now, when millions of dollars are in jeopardy, the State is barred by sovereign immunity. Why should the State be worse off because the Secretary approved the binding arbitration provision of the Plan instead of finding the Plan not to be in conformance with Federal law? It is also clear that once the sanction process is completed and the Secretary has issued the final determination of nonconformity of the State Plan and determined how many millions will be withheld, the Commissioner will be able to seek judicial review.[4] It makes no sense to construe the statutes to require the imposition of the sanction process before judicial review is available when it is clear that sovereign immunity has been waived when a determination of nonconformity has been made by the Secretary.

The Court of Appeals is indicating that the Commissioner must risk inconsistent decisions by going through the remand in which both the Commissioner and the nursing homes will be arguing that the statute conforms to Federal law (although each giving a different interpretation) and then facing a contrary decision involving the Commissioner and the Secretary.

Such an interpretation hinders the ability of the Commissioner to administer effectively the Medicaid program. If he

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[3] 42 U.S.C. §1316(a)(1), (2) and (3).

[4] 42 U.S.C. §1316(a)(3).

takes part in binding arbitration in accordance with State law, he is allegedly violating Federal law and putting millions of dollars of Federal matching funds at risk. If he heeds the Secretary and does not engage in any binding arbitration cases on the ground that to do so would violate Federal law, he would be risking violating State law and risking an adverse judgment in an arbitration case which could be rendered in his absence,[5] which could be res judicata,[6] and which would be subject to only very limited judicial review.[7]

B. The Interpretation Of The Court Of Appeals Is In Conflict In Principle With The Decisions Of This Court As Well As The Legislative History Of 42 U.S.C. §1316.

In *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), this Court held, "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." Thus in *Abbott Laboratories, supra,* it was held that agency action which was in the form of a final regulation was final for purposes of judicial review by way of declaratory judgment even

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[5]Section 52 C.G.S. §414; *International Brotherhood of Teamsters* v. *Shapiro,* 138 Conn. 57, 63, 82 A.2d 345 (1951).

[6]*Local 1219* v. *Connecticut Labor Relations Board,* 171 Conn. 342, 356, 370 A.2d 952 (1976); *Corey* v. *Avco-Lycoming Division, Avco Corporation,* 163 Conn. 309, 318-320, 307 A.2d 155 (1972), *cert. den.* 409 U.S. 1116, 93 S.Ct. 903, 34 L.Ed.2d 699 (1973).

[7]*Norwich Roman Catholic Diocesan Corporation* v. *Southern New England Contracting Co.,* 164 Conn. 472, 477, 325 A.2d 274 (1973); *Connecticut Union of Telephone Workers* v. *Southern New England Telephone Co.,* 148 Conn. 192, 169 A.2d 646 (1961); *United Electrical Radio & Machine Workers* v. *Union Mfg. Co.,* 145 Conn. 285, 288, 141 A.2d 479 (1958).

though sanctions pursuant to the regulations had not yet been imposed.[8]

Thus, it was stated in *Abbott Laboratories, supra:*

> "To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance...."

Abbott Laboratories, supra, at 153.

In the case at bar, the Secretary not only has the statute and final regulations requiring a single state agency but also has written a formal letter to the Attorney General of the State of Connecticut which took several months to prepare, was prepared after review of the statutes by the Regional Attorney's Office and which indicates that researching this matter took longer than expected. A-6a. As in *Harrison* v. *P.P.G. Industries, Inc.,* 446 U.S. 578, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980), short of an enforcement action, the agency has rendered its last word on the matter. Thus, in *Harrison, supra,* both sides were in agreement that a letter from the Regional Administrator of the United States Environmental Protection Agency constituted "final action," i.e., the agency's "last word on the matter."

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[8]See also *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 417-418, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942); *Frozen Food Express* v. *United States,* 351 U.S. 40, 44, 76 S.Ct. 569, 100 L.Ed. 910 (1956); and *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 199-200, 76 S.Ct. 763, 100 L.Ed. 1081 (1956).

In view of the steps taken in the preparation of the letter sent by the Regional Administrator and the failure of the Agency to give any indication that it does not represent "the last word on the matter" short of the invocation of the sanction procedure, the position taken by the agency should have been viewed as "final" agency action pursuant to the principle enunciated by this Court that the test of finality be viewed in a pragmatic way.

To say that the Commissioner must wait until the sanction of a formal determination of nonconformity, forcing him to put millions of dollars in jeopardy, is directly in contravention of the principles enunciated in *Abbott Laboratories, supra.*

The legal issue in this case is certainly fit for judicial resolution in that it is purely a question of law whether a State statute conforms to a Federal statute and regulations. It is also clear that the Secretary's position requires that the Commissioner cease all compliance with §17-311(b) of the Connecticut General Statutes or face the loss of millions or perhaps hundreds of millions of dollars. Absent "a statutory bar or some other unusual circumstance" access to the courts for a declaratory judgment action must be permitted. *Abbott Laboratories, supra.*

Clearly there is no statutory bar. As previously indicated, the Court of Appeals recognized that 42 U.S.C. §1316(a)(3) specifically waived sovereign immunity and specifically authorized judicial review of a determination that a state statute does not conform to Federal requirements.

In addition, the legislative history of 42 U.S.C. §1316 indicates that judicial review was intended. Thus Senate Report No. 404 regarding the Social Security Amendments of 1965 states:

> "The Committee bill contains new provisions effective January 1, 1966, for administrative and judicial review of certain administrative determinations under titles...XIX of the Social Security Act. These provisions are designed to assure that the States will not encounter undue delays in obtaining Federal determina-

> tions on acceptability of proposed State plan material under the public assistance programs, and that *the States will be able to obtain judicial review of their plan proposals at an appropriate stage of the proceedings.*" (Emphasis added). U.S. Code Cong. and Admin. News, 89th Cong. 1st Session 1965, Vol. 1, p. 2090 (hereinafter "Senate Report No. 404").

The appropriate stage of the proceedings in this particular case for judicial review is now. Judicial resolution of this controversy is appropriate prior to the accrual of millions of dollars of potential damages,[9] prior to placing the Commissioner in the

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[9]Senator Javits outlined the problem the legislation was directed to address as follows:

> "At present the public assistance provisions of the Social Security Act do not contain any provisions for appeal to the courts by the States from administrative decisions of HEW.... If a state wishes to contest the Department's determination that its State plan does not comply with the Federal Requirement, the State is then faced with the threat of the withholding of the Federal funds, which would impose a severe penalty upon the recipients of welfare." Remarks of Senator Javits, February 18, 1965, 89th Cong. 1st Session, 111 Cong. Rec. Part 3, p. 3066.

In support of his bill, he had printed an excerpt of the May 1964 report of the Advisory Commission on Intergovernmental Relations, which recommended as follows:

> "*The Commission believes that the most satisfactory approach* to providing judicial review of administrative decisions of the Secretary *is to establish a procedure whereby* in cases of disagreement between the State agency and the Secretary, *court review would occur prior to actual implementation of a proposed change* in the State's existing approved plan. *This would avoid the necessity for withholding or recouping Federal funds.* Court review would involve a determination of whether an amendment to the existing plan pro-

untenable position of facing potentially inconsistent interpretations of Federal law and prior to placing the Commissioner in the untenable position of having to choose between alleged violations of State or Federal law, all of which would result if the dismissal of the claims against the Secretary is upheld.

C. The Question Of The Exclusivity Of The Jurisdiction Of The Federal Court Of Appeals Regarding Cases Brought To Test The Validity Of The Secretary's Determination Of Nonconformity Of State Law To Federal Law Raises Important Questions Of Statutory Construction And The Decision Below Is In Conflict In Principle With Decisions Of This Court.

The question of whether 42 U.S.C. §1316 vests exclusive jurisdiction in the Court of Appeals regarding determinations of the Secretary that a previously unconstrued State statute does not conform with Federal law presents an important question of statutory construction of a statute which affects Federal programs involving millions of dollars and has potential impact on virtually all of the States. The conclusion of the Court of Appeals that it had exclusive jurisdiction of judicial review of such decisions is in conflict in principle with the decisions of this Court. There is no indication that the Court of Appeals engaged in the analysis set forth in this Court's recent decision of *Gulf Offshore Company* v. *Mobil Oil Corporation,* 49 U.S.L.W. 4920 (July 1, 1981) for determining whether Federal courts have exclusive jurisdiction over a case arising under Federal law.

> "In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins

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posed by the State or a new administrative requirement promulgated by the Federal agency conformed with the intent of the Federal statute. *Under such procedure there would be no disruption in the operation of the existing approved State plan until agreement between the parties was reached or the court decision was rendered."* 111 Cong. Rec., *supra,* at 3068. (Emphasis added).

> with the presumption that state courts enjoy concurrent jurisdiction. See *California* v. *Arizona,* 440 U.S. 59, 66-67 (1979); *Dowd Box Co.* v. *Courtney, supra,* at 507-508. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus the presumption can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." (Citations omitted).
>
> *Gulf Offshore Co., supra,* at 4921.

Analyzing 42 U.S.C. §1316 in accordance with *Gulf Offshore Co., supra,* reveals that it should not have been construed to provide exclusive jurisdiction to the Court of Appeals in reviewing determinations by the Secretary that previously unconstrued state statutes do not conform to Federal law.

1. Explicit Statutory Directive.

Section 42 U.S.C. 1316(a)(3) provides in pertinent part that "Any State which is dissatisfied with a final determination made by the Secretary under section...1396c of this title may...file with the United States Court of Appeals for the circuit in which such State is located a petition for review of such determination."

Clearly the statute explicitly grants jurisdiction to the Courts of Appeals. However this Court has held that, "It is black letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore Co., supra,* at 4921.[10]

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[10]See also *Houston* v. *Moore,* 18 U.S. (5 Wheat.) 1, 5 L.Ed. 19 (1820); *Claflin* v. *Houseman,* 93 U.S. 130, 23 L.Ed. 833 (1877); *Teal* v. *Felton,* 53 U.S. (12 How.) 284, 13 L.Ed. 990 (1851).

There is no explicit statutory language in 42 U.S.C. §1316 which grants exclusive jurisdiction to either the Federal Courts of Appeals or the District Courts as was found in 28 U.S.C. §1346(f) which was construed in *California* v. *Arizona,* 440 U.S. 59, 99 S.Ct. 919, 59 L.Ed.2d 144 (1979), in which the Congress had used the phrase, "The district courts shall have exclusive original jurisdiction..." in giving explicit statutory directive.

2. Unmistakable Implication From Legislative History.

The legislative history of 42 U.S.C. §1316 does not give an unmistakable implication that exclusive jurisdiction was given to the United States Courts of Appeals. What the legislative history makes clear is that the provision was adopted for the benefit of the States to enable them to "...obtain judicial review of their plan at an appropriate stage of the proceedings" without "...undue delays in obtaining Federal determinations on acceptability of proposed State plan material...."[11]

To the extent that jurisdiction was granted to the Federal Courts of Appeals it appears to have been done in furtherance of the desire to help the States to obtain expeditious resolution of disputed claims and avoid the interruption of Federal funds.

As originally proposed, Senate Bill S1184 provided for judicial review in the United States District Court for the district in which the capital of the State is located.[12] The recommendation of the Advisory Commission on Intergovernmental Relations on this issue was incorporated into the remarks of Senator Javits who sponsored S1184. The Advisory Commission recommended giving the States the right to appeal to the Courts of Appeals.

The concerns which the Commission sought to address were (1) the avoidance of disruption of Federal funds and (2) the

[11]Senate Report No. 404, *supra.*

[12]Senate Bill S1184 reprinted in 111 Cong. Rec. 3068 (February 18, 1965). [89th Cong. 1st. Session, Part 3].

avoidance of undue delay.[13] Hence they intended that court review would take place prior to actual implementation of the State Plan change and it would take place at the Court of Appeals level, thus minimizing any delay problem.

Obviously, as finally enacted the Commission's recommendation for granting jurisdiction to the Courts of Appeals for review of conformity decisions was passed.

3. Clear Incompatibility Between State Court Jurisdiction and Federal Interests.

There exists no clear incompatibility between state court jurisdiction and Federal interests.

Indeed it was more appropriate to seek a declaratory judgment in State court rather than in the United States District Court because the state of the Connecticut law is uncertain, the statute being susceptible to several possible interpretations and never having been construed by a State court. In addition, the matter is of great concern to the State of Connecticut and constitutes a part of a complex rate reimbursement system. In such circumstances a Federal court should abstain and remand.[14] In addition, the Secretary would be able to remove the case from the Superior Court to the District Court pursuant to 28 U.S.C. §§1441 and 1442 to have a Federal court decide the federal questions, even if upon removal the case was later remanded to State court, provided the right to do so was reserved in State court following the remand.[15]

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[13] 111 Cong. Rec. 3068 (1965), See f.n. 9, *infra.*

[14] *Naylor* v. *Case & McGrath,* 585 F.2d 557 (2d Cir. 1978). Cf. *United States* v. *Thirty-seven (37) Photographs,* 402 U.S. 363, 369, 91 S.Ct. 1400; 28 L.Ed.2d 822, *reh. den.* 403 U.S. 924, 91 S.Ct. 2221, 29 L.Ed.2d 702 (1971).

[15] *England* v. *Louisiana Medical Examining Board,* 375 U.S. 411, 417-418, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); *NAACP* v. *Button,* 371 U.S. 415, 427-428, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Hence, there is no incompatibility between State court jurisdiction and Federal interests. The Secretary has had an opportunity to make a determination of whether the State statute conforms to Federal requirements and has found first that it did conform and then that it did not. Therefore, this suit does not "...pre-empt a decision about the state plan's conformity with federal law which Congress has left to the Secretary in the first instance" as the Court of Appeals suggested. A-2a. The Secretary had his opportunity and decided first that it did conform and then that it did not conform. The date of the imposition of the sanction resulting from the decision is unclear. There is no Federal interest served by imposing the sanction if a judicial determination is made regarding the conformity. If the binding arbitration provision violates Federal law and therefore is unconstitutional, the Commissioner will not engage in it. If it is in conformance with Federal law, then the Secretary should not be permitted to withhold payment on the ground that it is not. Hence, everyone's interests are served by the means of this declaratory judgment action.

D. The Decision Of The Court Of Appeals Is In Conflict In Principle With The Decision Of Another Court Of Appeals.

In *County of Alameda* v. *Weinberger,* 520 F.2d 344 (9th Cir. 1975), the Court of Appeals for the Ninth Circuit held that sovereign immunity was not a defense in a case in which HEW had initially approved the State Plan, including the percentages to be paid by HEW and subsequently reversed its position and disallowed some eleven million dollars.

The Ninth Circuit held that judicial review of final agency action should not be cut off unless there is persuasive reason to believe that such was the purpose of Congress, citing *Abbott Laboratories, supra.* The Ninth Circuit went on to hold HEW had the burden of establishing by clear and convincing evidence that Congress had clearly commanded that review be prohibited citing *Barlow* v. *Collins,* 397 U.S. 159, 167, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970). *County of Alameda, supra,* at 348.

Thus *County of Alameda* decided by the Ninth Circuit took the view that judicial review should not be cut off without persuasive evidence that that was the intent of Congress. The Ninth Circuit did not view 42 U.S.C. §1316 as the outer limits of judicial review and specifically rejected the Secretary's argument that by granting jurisdiction to the Courts of Appeals in conformity cases all other forms of judicial review were precluded, which is in direct conflict with the Second Circuit's holding in this case.

CONCLUSION

This case raises several important issues which merit review by this Court.

First is the issue of whether a State must await the imposition of financial sanctions by the Secretary of Health and Human Services before obtaining judicial review of the Secretary's reversal of his prior approval of a State Plan provision. This issue poses a significant question of statutory construction regarding 42 U.S.C. §1316. The decision of the Second Circuit requiring the State to await the imposition of financial sanctions is in conflict in principle with the decision of this Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

Second, the issue of whether the Courts of Appeals have exclusive jurisdiction pursuant to 42 U.S.C. §1316 for judicial review of decisions by the Secretary regarding financial reimbursement under the Medicaid program is an issue which should be decided by this Court. The decision of the Second Circuit in this case is in conflict in principle with a decision of the Ninth Circuit in *County of Alameda* v. *Weinberger,* 520 F.2d 344 (9th Cir. 1975).

Finally, if the Commissioner is not permitted to obtain judicial review until after the conclusion of the sanction process, his ability to administer the Medicaid program will be severely impaired. He will be placed in the untenable position of putting

millions of dollars of Federal reimbursement at risk by having to choose between State law or the Secretary's most recent interpretation of Federal law.

For the foregoing reasons, the petitioner respectfully submits that the decision of the United States Court of Appeals for the Second Circuit merits review by this Court.

Respectfully submitted,

By

Arnold I. Menchel
Assistant Attorney General
90 Brainard Road
Hartford, CT 06114
Telephone (203) 566-7014
Attorney for Petitioner

Appendix

NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD W. MAHER, COMMISSIONER OF INCOME MAINTENANCE, STATE OF CONNECTICUT,
Petitioner,

V.

RICHARD SCHWEIKER, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; BURNSIDE CONVALESCENT HOME, INC.; EAST HARTFORD CONVALESCENT HOME; SAINT MARY HOME, INC.; SOUTH WINDSOR CONVALESCENT HOME, INC.; SOUTHPORT MANOR CONVALESCENT CENTER, INC.
Respondents.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 30th day of November, one thousand nine hundred and eighty-one.

Present:
Hon. Sterry R. Waterman,
Hon. James L. Oakes,
Hon. Thomas J. Meskill,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Edward Maher, Commissioner of Income Maintenance,
Appellant,

v.

Burnside Convalescent Home, Inc., et al.,
Appellees.

ORDER

This is an appeal from an order of December 16, 1980 by the United States District Court for the District of Connecticut, Jose A. Cabranes, District Judge, dismissing an action against the Secretary of Health and Human Services for lack of jurisdiction. We affirm, on the basis of the Secretary's sovereign immunity to suit in the absence of consent.

Appellant Maher, Connecticut Commissioner of Income Maintenance, brought an action for a declaratory judgment in Connecticut Superior Court, seeking interpretation of a state statute that provided for arbitration of Medicaid reimbursement rates "not resolved...to the satisfaction of [a health care]

institution and said commissioner." 17 Conn. Gen. Stat. § 311(b). The Commissioner joined the Secretary as a defendant along with the nursing homes seeking arbitration, in the hope of binding the Secretary to a judicial interpretation of the Connecticut arbitration statute in light of applicable federal statutes and regulations. The Secretary moved successfully under 28 U.S.C. §1442(a) for removal of the action to federal district court, whereupon the claims against the Secretary were dismissed and the remainder of the action remanded to state court.

The only issue on appeal is whether the Connecticut Superior Court had jurisdiction over such a claim for declaratory relief against the Secretary. If the state court had no jurisdiction, then the federal district court could have had none upon removal, *Minnesota* v. *United States,* 305 U.S. 382 (1939), and dismissal was proper.

The Connecticut courts lacked jurisdiction over claims for declaratory relief against the United States by virtue of the doctrine of sovereign immunity unless immunity was waived. Sovereign immunity bars declaratory actions no less than coercive actions. *Cf.* 10 Wright & Miller, *Federal Practice and Procedure: Civil* § 2766 at 843 (1973) (federal declaratory actions). And this was surely an action against the sovereign. A declaratory judgment that bound the Secretary could interfere with the Secretary's administration of federal Medicaid assistance to Connecticut, *see Larson* v. *Domestic & Foreign Investment Corp.*, 337 U.S. 682, 688, 704 (1949), and could pre-empt a decision about the state plan's conformity with federal law which Congress has left to the Secretary in the first instance, *see* 42 U.S.C. § 1396c, subject to review in the federal courts of appeals, *see* 42 U.S.C. § 1316(a)(3).

Appellant argues, first, that the Connecticut courts have concurrent jurisdiction to decide whether state statutes are in conformity with federal statutes and regulations. This proposition is surely correct, and indeed the Supremacy Clause mandates that state courts strike down state statutes to the extent that they cannot be interpreted to conform with controlling federal law.

It has no bearing, however, on whether the United States can be made an involuntary party in state court to a declaratory action.

Appellant argues, second, that Congress has waived sovereign immunity with respect to the issue of a state Medicaid plan's conformity with federal law. His reliance on 42 U.S.C. § 1316(a)(3) for this proposition, however, is misplaced. That statute constitutes at most a limited waiver of sovereign immunity, providing for judicial review in the federal courts of appeals of final determinations by the Secretary under 42 U.S.C. § 1396c that a state Medicaid plan does not conform to the requirements of section 1396a. Nothing in 42 U.S.C. §§ 1316(a)(3) or 1396c waives sovereign immunity with respect to declaratory judgment actions in state court or even in federal district court.[1]

Appellant's reliance on *California* v. *Arizona*, 440 U.S. 59 (1979) is also misplaced. In that case, interpreting 28 U.S.C. §§ 1346(a) and (f) to waive the federal government's sovereign immunity to quiet-title suits in the federal courts, the Supreme Court held that it could exercise its original jurisdiction over a suit by one state against another state and against the United States. Nothing in that decision suggests that whenever Con-

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[1]42 U.S.C. § 1316(a)(3) is not directly applicable in this case because the Secretary has not made any final determination of nonconformity under 42 U.S.C. § 1396c. The May 11, 1979 letter of the HEW Regional Director to the Connecticut Attorney General, which expressed a preliminary opinion that 17 Conn. Gen. Stat. § 311(b) was inconsistent with governing federal statutes and regulations, did not constitute a section 1396c determination. Nor have we any reason to expect that the Secretary is about to make such a determination; indeed the interpretation of 17 Conn. Gen. Stat. § 311(b) by the Connecticut state courts, where this litigation was remanded after the Secretary's dismissal, may satisfy the Secretary that the plan is in conformity, mooting the concerns expressed in the Regional Director's letter. And we see no reason why the Commissioner and the Secretary; rather than opposing each other, could not cooperate in the state litigation to such an interpretation acceptable to both.

gress waives sovereign immunity the state courts are presumed to gain jurisdiction over suits against the United States. The passage on which appellant relies for this incorrect proposition must be read in light of the language of the particular statute the Court was interpreting. True, the Court stated, "The congressional purpose [behind section 1346(f)] was simply to confine jurisdiction to the federal courts and to exclude the courts of the States, which otherwise might be presumed to have jurisdiction over quiet-title suits against the United States, once its sovereign immunity had been waived," 440 U.S. at 66-67. That presumption, however, might have arisen only because of section 1346(a)'s open-ended statement that "[t]he United States may be named as a party defendant in a civil action...[to quiet title]," *see id.* at 63-64, which, but for the limiting language of § 1346(f), could have been read to include a state "civil action." Because no statute at issue in this case provides for such an open-ended waiver of immunity, *California* v. *Arizona* is inapposite.

Judgment affirmed.

/s/Sterry R. Waterman
Sterry R. Waterman

/s/James L. Oakes
James L. Oakes

/s/Thomas J. Meskill
Thomas J. Meskill

Circuit Judges

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EDWARD W. MAHER, Commissioner
of Income Maintenance,

Plaintiff

v. : CIVIL NO. H. 79-707

BURNSIDE CONVALESCENT HOME, INC.,
et al

Defendants.

(Secretary's Motion To Dismiss and
Certification Of Service omitted
in printing.)

ORDER

The Secrtary's motion to dismiss is granted, on the ground that — even as amended — the complaint discloses no basis for the proposition that the state court had jurisdiction over the subject matter of the claims against her. Accordingly, this court has not acquired jurisdiction over such claims, *see Minnesota* v. *United States,* 305 U.S. 382, 389 (1939); *Special Prosecutor of the State of New York* v. *United States Attorney for the Southern District of New York,* 375 F. Supp. 801 (S.D.N.Y. 1974), and the action, which was properly removed to this court by the Secretary under 28 U.S.C. § 1442(a), must be dismissed as to her. So ordered.

/s/Jose A. Cabranes
Jose A. Cabranes, U.S.

Dated: Hartford, Connecticut
December 16, 1980

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
GOVERNMENT CENTER
BOSTON, MASSACHUSETTS 02203

HEALTH CARE FINANCING
ADMINISTRATION
Medicaid

May 11, 1979

In reply refer to: HCFA/MB

Mr. Carl R. Ajello
Attorney General
State of Connecticut
90 Brainard Road
Hartford, Connecticut 06114

Attention: Edmund C. Walsh

Dear Mr. Ajello:

This is in response to your March 19, 1979 inquiry on whether the binding arbitration provision of Section 17-311 of the Connecticut General Statutes violates HEW regulations on establishing Medicaid reimbursement rates.

Section 17-311 gives certain providers, aggrieved by reimbursement rates established by the Commissioner of the State Medicaid agency, the opportunity to go to binding arbitration. The arbitration board consists of a member appointed by the provider, a member appointed by the Commissioner and a member appointed by the chief court administrator from among the retired judges of the superior court.

EXHIBIT A

The types of Medicaid providers affected by the statute are: hospitals, (including chronic and convalescent hospitals), home health agencies, homemaker-home health aide agencies, rehabilitation centers and day care programs. (Rest homes, homes for the aged and vocational training programs are also mentioned in the statute but are not covered by the Medicaid program).

We have reviewed Section 17-311 of the State statutes with the Regional Attorney's office and have concluded that it violates Federal Medicaid rules and regulations on several counts:

1. Section 1902(a)(5) and implementing Regulations 42 CFR 431.10 require the designation of a single State agency with legal authority for administering the State Medicaid plan and for making rules and regulations governing administration of the State plan. The right to appeal, to the arbitration board, "any decision" rendered by the Commissioner of the Department of Income Maintenance regarding payment rates, would infringe on the agency's administrative authority over the Program and be in conflict with the single State agency concept;

2. In the case of hospitals, Federal statutes (1902(a)(13)(d)) and implementing regulations (42 CFR 447.261) spell out specific reimbursement principles to be followed in determining hospital payment rates. For all providers, Section 1902(a)(30) requires that the State agency develop methods and procedures to assure that payments are not in excess of reasonable charges. These methods and procedures are specified in the State plan. Section 17-311 provides no assurance that the members of the arbitration board will abide by such instructions in rendering a decision, thereby raising a possible conformity issue; and

3. Regulations 42 CFR 447.250 — 447.371 establish upper limits for payments to all types of providers. There is no assurance that these upper limits will be honored by the arbitra-

tion board. Any payment rates established by the board which exceed the upper limits would not be matchable.

Therefore, based on the above considerations, it is our conclusion that Section 17-311 pertaining to binding arbitration violates Federal Medicaid rules and regulations.

We apologize for the delay in our response but researching this matter took longer than expected.

If you have any other questions, please feel free to contact Gloria Nagle or Paul Duval at (617) 223-5347.

Sincerely yours,

/s/Donald L. Nelson
For Alfred G. Fuoroli
Regional Medicaid Director
Medicaid Bureau

Opposition

Office - Supreme Court, U.S.
FILED
MAY 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1683

In the Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD W. MAHER, COMMISSIONER OF INCOME MAINTENANCE OF CONNECTICUT, PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1683

EDWARD W. MAHER, COMMISSIONER OF INCOME MAINTENANCE OF CONNECTICUT, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that the district court lacked jurisdiction of this suit, commenced in state court, against the Secretary of Health and Human Services.

1. Petitioner filed a declaratory judgment action in state court seeking a determination of whether certain aspects of the operation of Connecticut's Medicaid plan were consistent with federal requirements. Petitioner joined the Secretary of Health and Human Services as a defendant. Pursuant to 28 U.S.C. 1441 and 1442, the Secretary removed the case to the United States District Court for the District of Connecticut (Pet. App. 2a). The district court dismissed the action against the Secretary for lack of jurisdiction and

remanded the remainder of the case to state court (*id.* at 2a, 5a). The court of appeals affirmed on the ground that sovereign immunity barred the action against the Secretary in the state court and, therefore, the district court acquired no jurisdiction upon removal (*id.* at 2a-5a).

The decision of the court of appeals is plainly correct and further review is unwarranted.

2. The Medicaid program was established in Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980); see *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981). Each participating state must submit to the Secretary a Medicaid plan that conforms to federal requirements. See *id.* at 37. One of these requirements is that a "single State agency" be designated to administer or supervise the administration of the plan. 42 U.S.C. 1396a(a)(5).

Within 90 days of submission of a Medicaid plan, the state is entitled to an initial determination of whether the plan satisfies federal requirements. 42 U.S.C. 1316(a)(1). If dissatisfied with the initial determination, the state is entitled to an administrative hearing. 42 U.S.C. 1316(a)(2). If, after the hearing, the state is dissatisfied with the Secretary's final determination, the state may "file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination." 42 U.S.C. 1316(a)(3). Similarly, if the Secretary determines, after notice and opportunity for a hearing, that an approved plan has so changed that it no longer complies with the requirements of 42 U.S.C. 1396a or that in the administration of the plan there is a substantial failure to comply with the requirements of that section, federal financial assistance

must be terminated until compliance is achieved. 42 U.S.C. 1396c. The state may seek review in the appropriate court of appeals. 42 U.S.C. 1316(a)(3).

3. Under Connecticut state law, any payment dispute between petitioner and certain hospitals or other kinds of health care facilities is subject to binding arbitration before a three member panel. Conn. Gen. Stat. Ann. § 17-311(b) (West Cum. Supp. 1981). Petitioner and the health care facility each appoint one member of the panel, and "the chief court administrator from among the retired judges of the superior court" appoints the third member. *Ibid.*

Petitioner sought the views of the regional office of the Department of Health and Human Services on whether use of the arbitration procedure for resolving Medicaid payment disputes would violate federal requirements. See Pet. App. 6a; see also Pet. 6. On May 11, 1979, the regional office expressed the view that the binding arbitration procedure was inconsistent with several Medicaid requirements, including the "single State agency concept." Pet. App. 6a-7a. The regional office's response to petitioner's inquiry contained no threat of any enforcement action, nor did it purport to direct petitioner to take any action.[1]

4. Petitioner's arguments rest on a fundamental misconception of the decision of the court of appeals in this case. The court below held that the action against the Secretary in state court was barred by the doctrine of sovereign immunity and, therefore, the district court acquired no jurisdiction of the action against the Secretary upon removal. See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939). As

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[1]Effective May 14, 1980, the Connecticut arbitration statute was amended to include the following sentence (Conn. Gen. Stat. Ann. § 17-311(b) (West Cum. Supp. 1981)): "The proceedings of the arbitration board and any decisions rendered by such board shall be conducted in accordance with the provisions of the Social Security Act, 49 Stat. 620 (1935), 42 U.S.C. 1936 [*sic*], as amended from time to time * * *."

this Court recently observed, "it is well settled that if the state court lacks jurisdiction over the subject matter or the parties, the federal court acquires none upon removal, even though the federal court would have had jurisdiction if the suit had originated there." *Arizona* v. *Manypenny*, 451 U.S. 232, 242 n.17 (1981). Petitioner has not identified any statute waiving the sovereign immunity of the United States to suit on petitioner's claim in state court.[2]

There is no conflict between the decision of the court of appeals in this case and *County of Alameda* v. *Weinberger*, 520 F. 2d 344 (9th Cir. 1975). In *County of Alameda*, the Ninth Circuit held that Congress' failure to provide for judicial review of the Secretary's reimbursement decisions under Section 1116(d) of the Social Security Act (42 U.S.C. 1316(d)) was insufficient evidence of an intention to preclude federal judicial review of final agency action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Nothing in *County of Alameda* suggests that the United States is subject to suit in a state court, absent a waiver of sovereign immunity; by the same token, nothing in the decision of the court of appeals in this case suggests that final action of the

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[2]Thus, petitioner's reliance (Pet. 16-20) on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), is misplaced. Although the advice of the regional office on the validity of the binding arbitration procedure under the Medicaid program obviously is not a "final" agency decision in any meaningful sense, the decision of the court of appeals does not rest on that ground.

Similarly, *Gulf Offshore Co.* v. *Mobil Oil Corp.*, No. 80-590 (July 1, 1981) (see Pet. 20-24), is irrelevant here. Whether Section 1116(a)(3) of the Social Security Act (42 U.S.C. 1316(a)(3)) vests exclusive jurisdiction to review conformity decisions of the Secretary (42 U.S.C. 1396c) in the federal courts of appeals is immaterial to the decision in this case. As the court of appeals observed (Pet. App. 3a), that question "has no bearing * * * on whether the United States can be made an involuntary party in state court to a declaratory action."

Secretary respecting the validity of Connecticut's binding arbitration procedure under the Medicaid program would not be subject to judicial review in the proper federal court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

DOJ-1982-05